as though it were his income. Section 36(1) alters this legal result for the purpose of computing the statutory income of such a person.

It is therefore unnecessary to consider the provisions of section 36(2), but, in any event, we are unable to agree with the construction given to it by Tan Ah Tah F.J. He says there are two sets of circumstances provided for by that sub-section, the first being where a change occurs in a partnership in such circumstances that one or more of the partners continue to be partners. The words in that sub-section, however, are "in such circumstances that one or more of *the persons* who until that time were engaged in the trade, profession or business continue to be engaged *therein*". Those words clearly relate to a change in a partnership in such circumstances that one or more of the persons who were engaged in the trade, profession or business continue to be engaged "therein" i.e. in the trade, profession or business.

It follows, therefore, even if section 36(2) is relevant, on the facts of the present case, the appellant falls within the first of the two sets of circumstances mentioned in section 36(2). He has on the facts either retired from the partnership carried on under the style or firm name of X. & Co. or, by reason of his ceasing to be a partner, there has been a dissolution of the partnership as to one or more of the partners thereof. A change has accordingly occurred in the partnership of persons, namely in X. & Co., carrying on the profession of advocates and solicitors and this change has occurred in such circumstances that the appellant, who until that time was engaged in the profession of an advocate and solicitor, continues to be engaged in it namely, by practising his profession as a partner in the partnership carried on under the style or firm name of Y. & Z. The position would be the same even if he had continued to be engaged in the profession on his own account after ceasing to be a partner of X. & Co.

For all these reasons the appeal must be allowed with costs here and below.

Appeal allowed.

Solicitors: *Rodyk & Davidson.*

GOMEZ v. GOMEZ

[O.C.J. (Raja Azlan Shah J.) March 6, 1969]
[K.L.— Divorce Petition No. 23 of 1967]

Practice and Procedure — Affidavit — Whether person other than deponent to an affidavit can be cross-examined — Discretion of court — R.S.C. 1957, O. 38 r. 1.

Family Law — Divorce — Custody of child — Application to vary order of custody.

Evidence — Affidavit, by — Cross-examination of person other than deponent to affidavit —Discretion of court.

This was an application to vary the order of custody of a child, which had been made in divorce proceedings. One of the grounds in support of the application was the re-marriage of the respondent to a Hindu. The respondent in answer stated that she contnued to practise her religion, Catholicism, and that the child was being educated in the Catholic faith. A letter from a Catholic priest supporting this was annexed to the respondent's affidavit. The applicant applied to cross-examine the priest.

Held: the court had a discretion in the matter and in this case would allow the application, as it is fair and proper that the applicant be allowed to cross-examine the priest.

Cases referred to:—

(1) *Leiserach* v. *Schalit* [1934] 2 K.B. 353.

(2) *Abrahams & Co.* v. *Dunlop Pneumatic Tyre Co. & Ors.* [1905] 1 K.B. 46. 52.

(3) *In re SBA Properties Ltd.* [1967] 1 W.L.R. 799.

(4) *In re Holt* (1880-81), 16 Ch. D. 115.

APPLICATION.

R.K. Nathan for the applicant.

M.S. Naidu for the respondent.

Raja Azlan Shah J.: This case raises the singularly important question as to whether a person other than the deponent to an affidavit can be cross-examined. Order 38 rule 1 provides that "a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit." The matter arose in this way.

The respondent who was the former wife of the applicant successfully obtained a divorce from him. Both are Catholics. The respondent was granted custody of their child. The applicant was given access to visit her. The respondent later married one Mr. C. Nadarajah, a Hindu. The applicant applied by way of summons in chambers to vary the order of custody; he now wants to have custody of the said child. One of the grounds in support of that application was the re-marriage of the respondent to a Hindu. Paragraph 13 of his affidavit states.—

"By the petitioner subsequently marrying a Hindu or a non-Catholic she is now outside the Roman Catholic Church and is no more capable of looking into the said child's religious and moral upbringing."

The respondent filed an affidavit in answer, paragraph 7 of which reads as follows:—

"As to paragraph 13 although I am married to a Hindu I continue to practise my religion, Catholicism, without any interference from my husband. I attend Church on Sundays and other religious days with the said child regularly. The said child is now attending Assunta Convent (Primary) School, Petaling Jaya which is a Catholic School. A letter to this effect from

the Assistant Priest of St. Francis Xavier's Church, Petaling Jaya is annexed hereto and marked 'BCN. 1'."

Exhibit "BCN. 1" states as follows:—

"St. Francis Xavier's
Jalan Gasing,
Petaling Jaya,
Selangor.

TO WHOM IT MAY CONCERN:

Mrs. Bessie Carol Nadarajah is still capable of taking care of her child's religious and moral upbringing. The child, Angeline Carol Gomez, is now registered for admittance to a Catholic School in January 1969. The child is brought to religious services of the Catholic Faith and Mr. C. Nadarajah places no obstacle either to his wife's practice of her religion or to the child being educated in the Catholic faith.

(Sd.) J. Wood, S.J.
Assistant Priest,
St. Francis Xavier's Church."

The applicant filed an affidavit in reply, paragraph 7 of which is relevant:—

"With regard to paragraph 7 the petitioner in the eyes of the Roman Catholic Church by divorcing her husband and marrying a Hindu is living in sin and cannot practise the religion while continuing to live in daily sin. The petitioner is not a practising Catholic in that she cannot receive Holy Communion nor the Sacraments nor can she receive the last rites. With regard to the child attending a Catholic school I wish to respectfully point out that Muslims and Buddhists also attend Catholic schools. I have been born a Catholic and am a practising Catholic in that I attend Church on Sundays and receive the Sacraments."

The applicant now applies for leave to cross-examine the respondent and the said Rev. Father J. Wood. The application for variation of the order of custody is still pending.

There can be no doubt that a party cannot be denied the right to cross-examine the opposite party upon his affidavit. That is a sound rule of practice and Order 38 rule 1 was primarily designed in that direction. Mr. Naidu, for the respondent, concedes that the court may order cross-examination of a person who has made an affidavit but argues that there is no provision with regard to any application to cross-examine a person other than the deponent. He says that only in special circumstances can such a person be cross-examined. He cites the case of *Leiserach* v. *Schalit* [1] in which arbitrators were allowed to give evidence on a motion to set aside an award where the court could not ascertain the essential facts from the affidavits. Mr. Nathan for the applicant also relies on that case. It is therefore necessary to examine it in some detail.

The parties there came to a dispute as to certain matters arising under an agreement. It was referred to two named arbitrators who gave an award. Both parties were not happy with the said award. They then gave notice by motion and cross-motion to set aside the award. Affidavits were filed but they were to some extent contradictory in regard to certain vital matters of fact. An application was made to the court on behalf of one of the parties for leave to call the two arbitrators as witnesses in regard to these disputed matters. Humphreys J. in allowing the application said at page 355:—

"This is a case in which the court has listened to numerous affidavits, statements in some of which directly contradict the statements in others. It is also a case in which it is essential, in order to do justice, that the court should be enabled to make up its mind as to the actual facts of the case. In the view of the court this is an exceptional case, and in this exceptional case the court has arrived at the conclusion that the only way in which it can satisfactorily deal with the matter before it is by having the assistance of the evidence of the arbitrators, who, being independent persons, can tell the court what it is unable to ascertain from a perusal of the affidavits on one side and the other — namely, what are the essential facts of the case. On that ground and on that ground only the court accedes to the application to call as witnesses both the gentlemen who acted as arbitrators in the matter."

It is also settled law that if the issue in the case relates, not to controverted facts appearing on the face of the affidavits but to an issue which must be tried in the action, then Order 38 rule 1 does not apply: see *Abrahams & Co.* v. *Dunlop Pneumatic Tyre Company & Ors.* [2] where Mathew L.J. in considering the provisions of the (English) Order 38 rule 1, which is the same as ours said:—

"That applies only to a question of fact which the court or a judge has at the time jurisdiction to decide, and not to a question to be tried in the action."

A recent case is *In re SBA Properties Ltd.* [3] The Board of Trade brought an action in the name of the company against four defendants, one of which was a bank, in reliance on certain provisions of the English Companies Act, 1948 and subsequently filed a petition for the winding up of the company by the court on the ground that it was just and equitable for it to be so wound up. The bank applied to strike out the action as having been brought without authority. The court stood the action over pending the hearing of the petition in case the liquidator appointed thereunder chose to ratify the proceedings. The petition was supported by the usual statutory affidavits. The solicitor for the bank also put up an affidavit in which he raised a number of complaints about the manner in which the Board of Trade was carrying out the action especially on the question of costs if the liquidator was appointed. There was an affidavit in answer by Mr. Deane, an official of the board. On the hearing of the petition the bank applied for an order under (the new) Order 38 rule 2(3) which is substan-

tially the same as ours, for cross-examination of Mr. Deane on his affidavit. The preliminary question arose whether the bank had any *locus standi* in the matter. Pennycuick J. at page 803 said:—

"I should add that if the bank has established that it was a creditor, I am very far from being persuaded that this is a case in which it would have been right for me in the exercise of my discretion under R.S.C., Ord. 38, r. 2(3), to direct cross-examination of Mr. Deane at the instance of the bank. The issue with which I am concerned is whether this company should be wound up. The matters which have been raised on behalf of the bank in Mr. Sykes' affidavit are all matters relating to the action. The bank complains of the manner in which the Board of Trade has carried on the action. It complains of the expenditure of public funds on the prosecution of the action and it complains of the Board of Trade's intention, if able to do so, to ratify the commencement of the action in the name of the company. More specifically it complains of certain matters relating to particulars and discovery. The evidence which has been filed on either side on these matters does not seem to me to be directly relevant to the question whether it is just and equitable that the company should be wound up on the petition of the Board of Trade, and I do not think that if I have a discretion in this matter I ought to exercise it by allowing cross-examination on those matters. They are only very indirectly relevant to the question which I will have to decide, namely, whether the winding up order should be made. Their relevance is to the action rather than to the question whether the company should be put into liquidation."

These cases are not to be read as laying down rules of universal application. If once it were taken as settled, then there is no room for the exercise of discretion but a rule of law is substituted for it. The power given by Order 38 rule 1 is obviously a matter of discretion to be exercised in accordance with well-known judicial principles.

In the present case there is only one issue, that is, the issue in the pending action which is whether the order of custody can be varied. The matter raised in the three affidavits are all matters relating to the action. The applicant complains that the respondent is no longer a fit and proper person to have custody of the child. The respondent says that she is still capable of looking after the child's religious and moral upbringing. The Rev. Father Wood supports her. It is the same as if he has sworn an affidavit to that effect. It is therefore only fair and proper that the appellant be allowed to cross-examine them on their affidavits.

Mr. Naidu further raises a technical question i.e., that the application to vary the order of custody is defective. He says that the application should have been commenced by way of motion: see *In re Holt.*[4] I do not feel disposed to adjudge on this point. In my view the appropriate time to raise it is at the hearing of the application to vary the said order.

I shall allow the application in terms of the prayer. The Registrar will fix a date for cross-examination of these persons.

Application allowed.

Solicitors: *R.K. Nathan & Co.*; *Braddell & Ramani.*

TAN SIN v. PUBLIC PROSECUTOR

[A.Cr.J. (Raja Azlan Shah J.) March 10, 1967]

[Malacca — Criminal Apeal No. 40 of 1967]

Local Authority — Building plan — Deviation from approved plan — Continuing offence — Owner of building liable — Municipal Ordinance (S.S. Cap. 133), ss. 144(10)(b) and 392.

This was an appeal against the conviction of the appellant for an offence under section 144(10)(b) of the Municipal Ordinance for deviating from a specification approved by the Municipality. On appeal it was argued (1) that the complaint was not made within 12 months after the commission of the offence as required by section 392 of the Ordinance and therefore the appellants could not be liable to any fine or penalty and (2) that the appellant was not the owner of the land on which the building was erected and therefore he was wrongly charged and convicted.

Held, dismissing the appeal: (1) the offence in this case was a continuing offence and therefore section 392 of the Municipal Ordinance did not apply to it;

(2) the appellant was rightly charged and convicted as he was the owner of the building and as he had failed to comply with the approved plan of the existing building.

Cases referred to:—

(1) *Chepstow Electric Light & Power Co.* v. *Chepstow Gas & Coke Consumers' Co.* [1905] 1 K.B. 198

(2) *Thomas Welsh & Sons* v. *West Ham Corporation* [1900] 1 Q.B. 342.

(3) *Rex* v. *Taylor* [1908] 2 K.B. 237.

(4) *Marshall* v. *Smith* (1873), C.P. Cases 417.

(5) *Lim Beng Teck* v. *R.* [1957] M.L.J. 21.

(6) *Darus bin Ahmad* v. *Public Prosecutor* [1965] 1 M.L.J. 200.

(7) *Sivasupramaniam* v. *Public Prosecutor* [1968] 1 M.L.J. 80.

MAGISTRATE'S CRIMINAL APPEAL.

Thara Singh Sidhu for the appellant.

Abdullah bin Ghazali (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah J.: I am of the opinion that this conviction must be affirmed. The proceedings were commenced by a complaint dated 27th September 1966 under section 144 (10)(b) of the Municipal Ordinance (Cap. 133) against the appellant (owner of the premises in question) for deviating from a specification approved by the Municipality.